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No. 77-1376

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, APPELLANT

v.

STATE OF GEORGIA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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This memorandum is in response to appellees' attempt to supplement the record in this case by attaching as an appendix to their Motion to Affirm (Motion 2a-8a) a letter and computer print-out sent to them by an attorney in the Department of Justice in connection with an unrelated matter.[1] They contend (Motion 9, n. 3) that this material is "new matter not earlier available" and therefore properly considered by this Court pursuant to Rule 16(5). In our view, it is questionable whether this

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[1]These materials were sent in response to a telephone call and letter from an Assistant Attorney General of Georgia who stated that he wanted to determine if any legislation subject to the Voting Rights Act had not been submitted to the Attorney General as required by the Act.

material is within the scope of Rule 16(5), which permits the filing of a supplemental brief to call the Court's attention to "new cases or legislation or other intervening matter not available at the time of his last filing."

The Department of Justice keeps a computerized index of Section 5 submissions, and had this list been requested during discovery it would have been provided to appellees. If appellees had then chosen to offer the list in evidence at trial, the United States would have been afforded the opportunity to explain how the list is compiled and what its significance is.

A year after Georgia's March 1970 submission to the Attorney General (see J.S. 8-9), the Department of Justice instituted its computerized index of Section 5 submissions. A paraprofessional was assigned in 1971 to go through the materials submitted since the Act's inception in 1965 and to record these previous submissions on the computer. Using his own judgment, the paraprofessional described the materials he found within each earlier submission so that a record could be kept on the computer.

In describing the Georgia submission of March 1970, he listed seven provisions he found within H.B. 1304. The numbered post and majority vote provisions were two of those provisions. He could not determine whether any or all of the seven provisions were in fact submitted to the Attorney General. From the materials in front of him, he could not determine whether these provisions were changes from the voting procedure in force and effect on November 1, 1964, and hence subject to the preclearance requirements of the Act. Moreover, as we stated in the Jurisdictional Statement (p. 13), it is irrelevant whether a member of the Attorney General's staff might have

noticed these provisions if Georgia never asked the Attorney General to clear them.

Had the paraprofessional looked at the Department's file, he would have discovered that the memoranda analyzing the November 1970 submission do not discuss either of these provisions. But it was not his job to analyze such materials. He was merely describing for computer records the materials he found within earlier submissions, not making a legal or administrative judgment of what voting procedures had been properly submitted to the Attorney General pursuant to Section 5.

The computerized index is only a part of the Department's effort to keep appropriate records of materials sent to the Attorney General and of his actions under Section 5. The Department maintains public files on each submission in addition to the index. Department personnel seeking information regarding past submissions are expected to look at the appropriate files as well as the index. In the past there has been no systematic method of correcting errors on the computer index, although consideration is being given now to ways to correct and improve the computer records.

For the reasons stated in the Jurisdictional Statement, the judgment of the district court should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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